

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

City of Sioux City

Woodbury County, Iowa

**ADMINISTRATIVE
CONSENT ORDER
NO. 2012-WS-03**

**TO: Nicole M. Jensen-Harris, City
Attorney
City of Sioux City
405 6th Street
Sioux City Iowa
P.O. Box 447
Sioux City, Iowa 51102**

I. SUMMARY

This administrative consent order (order) is entered into between the City of Sioux City (City) and the Iowa Department of Natural Resources (Department). The parties hereby agree to the issuance of this order concerning the public water supply system serving the residents of the City.

Any questions or responses regarding this order should be directed to:

Relating to technical requirements:

Julie Sievers, Environmental Specialist

IDNR Field Office #3
1900 N Grand
Spencer, IA 51301
712/262-4177

Relating to legal requirements:

Carrie Schoenebaum,
Attorney at Law
Iowa Department of Natural Resources
Wallace State Office Bldg. 502 E. 9th Street
Des Moines, Iowa 50319-0034
Ph: 515/281-0824

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034

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II. JURISDICTION

This order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part 1, and the rules promulgated or permits issued pursuant thereto; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10 (455B), which authorize the director to assess administrative penalties.

III. STATEMENT OF FACTS

The parties hereby agree to the following statement of facts.

1. The City provides drinking water for approximately 85,088 residences from the Zenith water treatment plant. Two wellfields, the Riverfront and the Cook Park wellfields, supply water to the Zenith treatment plant. Treatment consists of iron and manganese removal and treatment for particulate removal and inactivation to meet the surface water treatment rule requirements. Plant storage consists of a 350,000 gallon clearwell. Distribution system storage and pressure consists of 23.3 million gallons of ground storage and 3.5 million gallons of elevated storage. Five booster pumping stations are located within the distribution system. This system has 5 pressure zones. This facility also provides water to the City of Sergeant Bluff, Iowa; the City of South Sioux City, Nebraska; the City of Dakota Dunes, South Dakota; the DOI rest areas on I-29 and several industrial users who previously had their own public water supplies. The City is currently in the bid phase for pretreatment at the Zenith treatment plant for removal of various minerals and organics, and is in the construction phase for a new well field and treatment plant called the Southbridge Regional Treatment Plant. This project will increase the City's capacity to provide drinking water by 10 million gallons per day.

2. On July 15, 2010, the Department received an anonymous complaint indicating that the City had constructed temporary water lines without flushing and disinfection. Therefore, it was alleged that dirty and unsanitary water was being provided to the residents of the Heights Area of the City. Julie Sievers, an Environmental Specialist Senior of the Department, spoke with Timothy Higgins, Water Distribution Operator in charge of the City's Water Supply. Mr. Higgins stated that the Heights Area project was in its second year of a three year project and that temporary water mains had been installed as part of the project to provide continuous water service to the residents of the area. He referred Ms. Sievers to Bryan Wells of DeWild Grant and Reckert (DGR), the Design Engineer of the project, who stated that the City considered the lines service connections and therefore they did not need to be disinfected, flushed, or tested for bacteria. Mr. Wells and Mr. Higgins eventually agreed that the temporary line was more than a service line and in the future the City would flush, disinfect and test the lines. The line in question was tested and it was determined that no total coliform bacteria were in the line at that time.

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3. While speaking with Mr. Wells of DGR, Ms. Sievers inquired about the construction permitting of the project. He referred her back to the City. Ms. Sievers sent an email to Mr. Higgins inquiring about the construction permits for the project. In response she received a phone call from Scott Logan from the City's Engineering Division, stating that he believed the City had delegated permitting authority pursuant to Iowa Code section 455B.183. Ms. Sievers referred him to Jennifer Bunton of the Department's Water Supply section. Ms. Bunton confirmed that the City does not have delegated permitting authority for water supply construction projects. Satya Chennupati, the Department's Wastewater Engineering Section Supervisor, also confirmed that the City does not have delegated permitting authority for wastewater construction projects. Even if the City had delegated permitting authority for water supply or wastewater construction projects, this authority applies only to water or sewer main extensions; not reconstruction and major construction projects. The bulk of the work which has been done by the City would fall under reconstruction and major construction projects.

4. Since 2007, the City has failed to obtain approximately 46 permits for water supply construction projects. Of these projects, only 4 of those projects may have possibly met the requirements for delegated permitting authority. For the portions of the projects that were constructed using State Revolving Fund Loans (SRF), the City did obtain the necessary construction permits.

5. In addition 567 IAC chapter 9 which governs delegated permitting authority requires that those who have such delegated authority submit the following to the Department: (1) A copy of the permit and the applicable review checklist upon issuance of each permit; and (2) a complete quarterly report (Form 5) by the fifteenth day of the month following each quarter of the calendar year. Despite the City's belief that they had delegated authority the City has not submitted either of these reports to the Department.

6. On July 23, 2010, the City submitted an application for delegated permitting authority for water and sewer main extensions to the Department's Water Supply engineering and Wastewater engineering sections. To date, delegated permitting authority to the City of Sioux City has not been approved.

7. On July 28, 2010, the City provided the Department a list of the 2010 water supply and wastewater construction projects and their status.

8. On August 3, 2010, the Department sent the City a Notice of Violation (NOV) for construction without a permit and for failing to meet the construction standards required when constructing a temporary water line. This letter required that the City submit to the Department as-built plans and specifications, and permit applications and fees for the 2010 projects by September 10, 2010. This letter also required that by October 15, 2010, the City submit a list of all water and sewer main projects constructed since January 1, 2007.

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9. On October 25, 2010, the City submitted to the Department a list of unpermitted projects from January 1, 2007, through December 31, 2009.

10. On November 13, 2010, the City submitted incomplete as-built plans and specifications, incomplete construction applications, and/or a portion of the relevant permit fees for the 2010 water supply projects. To date, much of this information is still incomplete.

11. On August 31, 2011, the Department sent the City a NOV for further construction without the necessary permits. On August 24, 2011, Ms. Sievers had a phone call with City Engineer Scott Logan following her onsite inspection of Wesley Parkway reconstruction, Pierce Street reconstruction, Fairmount project 1 and 2 reconstruction, and the Nebraska Street project. Mr. Logan confirmed that construction on at least the Pierce Street and project 1 of the Fairmount reconstruction projects was occurring without permits.

IV. CONCLUSIONS OF LAW

The parties agree that the following conclusions of law are applicable to this matter.

1. Iowa Code Section 455B.183 states that

[i]t is unlawful to carry on any of the following activities without first securing a written permit from the director, or from a city or county public works department if the public works department reviews the activity under this section, as required by the department:

a. The construction, installation, or modification of any disposal system or public water supply system or part thereof or any extension or addition thereto except those sewer extensions and water supply distribution system extensions that are subject to review and approval by a city or county public works department pursuant to this section, the use or disposal of sewage sludge, and private sewage disposal systems.

The above stated facts show noncompliance with this provision.

2. 567 IAC 43.3(3) pertains to water supply construction and states "No person shall construct, install or modify any project without first obtaining, or contrary to any condition of, a construction permit issued by the director or by a local public works department authorized to issue permits under 567 IAC chapter 9 except as provided in 43.3(3)"b", 43.3(4) and 43.3(6)." The City failed to get permits for numerous projects

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since at least 2007, therefore the above stated facts show noncompliance with this provision.

3. 567 IAC 43.4(3)"b" states that construction permits applications must be submitted to the Department at least 30 days prior to the proposed date for commencing construction or awarding of contracts. This requirement may be waived when an imminent health hazard exists and specifies the waiver conditions. The above stated facts show noncompliance with this provision.

4. 567 IAC 43.3(6) states:

Standard specifications for water main construction by an entity may be submitted to the department or an authorized local public works department for approval. Such approval shall apply to all future water main construction by or for that entity for which plans are submitted with a statement requiring construction in accordance with all applicable approved standard specifications unless the standards for public water supply systems specified in 43.3(2) are modified subsequent to such approval and the standard specifications would not be approvable under the modified standards. In those cases where such approved specifications are on file, construction may commence 30 days following receipt of such plans by the department or an authorized local public works department if no response has been received indicating construction shall not commence until a permit is issued.

The City does not have delegated permitting authority for water main extensions under 567 IAC chapter 9 and did not get construction permits for the water main construction projects for the past several years except for projects funded by SRF funds. In addition, the bulk of the projects would not be covered under the delegated permitting authority because they are reconstruction projects, not water main extension projects. Therefore the above stated facts demonstrate that the City is in violation of these rules.

5. 567 IAC 43.3(2)"a" states that standards for a water supply project are the Ten States Standards and the American Water Works Association (AWWA) Standards as adopted through 2003. Section 8.7.6 of the Ten States Standards, 2003, states "New, cleaned and repaired water mains shall be disinfected in accordance with AWWA Standard C651. The specifications shall include detailed procedures for the adequate flushing, disinfection, and microbiological testing of all water mains. In an emergency or unusual situation, the disinfection procedure shall be discussed with the reviewing authority." AWWA Standard C651 includes the minimum requirements for the disinfection of water mains, including the preparation of water mains, application of chlorine, and sampling and testing for the presence of coliform bacteria. The standard includes new and repaired mains and does not make exceptions for temporary mains. The City did not meet these requirements as it did not flush, disinfect, or test the mains, or consult with the Department. Therefore, the above stated facts demonstrate the City is in noncompliance with this rule.

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V. ORDER

THEREFORE, the Department orders and the City agrees to comply with the following provisions in order to cease, abate, and redress the above-cited violations:

1. The City shall cease all illegal construction and in the future obtain the proper permits prior to construction;
2. By March 30, 2012, the City shall submit to the Department construction permit application forms and schedules all the information necessary to receive as built approval for all water supply projects commenced since January 1, 2007;
3. By March 30, 2012, the City shall pay all relevant fees associated with submittal of application forms and schedules; and
4. The City shall pay a penalty of \$10,000.00 within 30 days of the date the Director of the Department signs this order.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for the violations involved in this matter.
2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to this chapter, the Department has determined that the most effective and efficient means of addressing the above-cited violations and deterring this party and others from violating water supply permit requirements, is the issuance of an administrative order with an administrative penalty. The administrative penalty is determined as follows:
 - a. **Economic Benefit**. The City saved a significant amount of time and money by not obtaining the required construction permits. The Department does not know exactly how many years the City has been constructing without permits. The permit application fees are based on the length of permitted water main and the fees are capped at \$5,000.00 per year. Based on the information the City has submitted to the Department at this time, it is reasonable to estimate that approximately \$6,600.00 in fees should have been paid for 2007-2009. However, the Department's fee structure allows for some savings by grouping smaller projects together and submitting them as one larger project. Therefore, a reasonable estimate of economic benefit realized by the City is \$5,000.00. The

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Department is asking that the fees be paid by the City. Nevertheless, there is an economic benefit from delayed payment of these fees. However, in light of the maximum penalty the Department can collect when handling a matter administratively a penalty will not be assessed for this factor.

b. **Gravity of the Violation**. The City has continuously failed to apply for construction permits prior to construction. This failure has resulted in the completion of a substantial number of projects without permits. Failure to obtain construction permits prior to construction thwarts the integrity of the program because such permits ensure that a water supply distribution system is constructed in a manner that protects public health and safety. The Department learned of the violations because a resident complained that dirty unsanitary water was coming into their home. Nevertheless, the Department is not asserting an actual threat to public health, it is asserting that construction without permits and failure to flush and disinfect a drinking water distribution line threatened public health. Construction without permits creates a substantial threat to public health and safety because it is impossible to determine whether what has been constructed complies with Iowa law. In addition these violations are repeat in nature; after the Department notified the City in August 2010 of the violations the City continued to construct without permits. Additional violations were documented in August 2011. Lastly, the Department has expended a significant amount of staff time in an effort to assist the City in achieving compliance. The Department has determined that the most effective and efficient means of addressing the above cited violations is with administrative penalties, which are lower than those that could be obtained through judicial enforcement. Therefore, \$5,000.00 is assessed for this factor.

c. **Culpability**. In determining the degree of intent or negligence the standard of care required by the laws of the state of Iowa should be considered. The Department asserts that the City's actions were negligent rather than intentional. Generally negligence is defined as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Black's Law Dictionary*, 470 (2nd Pocket Edition, 2001). The violations involved in this order were violations of conditions of multiple rules and statutory provisions. A reasonable person should be aware of the laws which govern their business. The City employs licensed engineers that specialize in creating the design and specifications for public utilities. It follows that such engineers have a duty to be aware that the construction of a water supply distribution system requires a permit issued by the Department. In fact, the City demonstrated that it understood the permitting requirements by obtaining such permits for the portions of the project that qualified for SRF funding. Last, the City failed to comply with the permitting requirements subsequent to notification from the Department that it was in noncompliance. In August 2010, the City was issued its first NOV for construction without permits and then in August 2011 the Department documented that the City had started construction on projects that had been submitted to the Department for construction permits but the permits had not yet been issued. These permits had not been issued for various reasons: the applications were either incomplete or the proposed

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construction did not meet the required standards. Therefore, \$5,000.00 is assessed for this factor.


VII. APPEAL RIGHTS

Iowa Code section 455B.175(1), and 561 IAC 7.4(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Commission. This order is entered into knowingly by and with the consent of the City. By signature to this order, all rights to appeal this order are waived by all parties.

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VIII. NONCOMPLIANCE

Failure to comply with this order may result in the imposition of further administrative penalties or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with provision "V. Order" of this order constitutes full satisfaction of all requirements pertaining to the violations described in this order.



Paul Eckert, City Manager of the City of Sioux City

Dated this 13th day Feb., 2012



Roger E. Lande, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 1st day March, 2012

II.A.1. Carrie Schoenebaum; Julie Sievers; Jennifer Bunton